
(1999) 10 MP CK 0002

In the Madhya Pradesh High Court

Case No : Writ Petition No. 3536 of 1999

Karamchand Thapar and Brothers (C.S.) Ltd., Nagpur

APPELLANT

Vs

M.P. Electricity Board and others

RESPONDENT

Date of Decision : 07-10-1999

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2000) 2 MPLJ 453

Hon'ble Judges : S.P. Khare, J

Bench : Single Bench

Advocate : Abhay Sapre, for the Appellant; R.S. Jaiswal for respondents Nos. 1 and 2, S.K. Seth and S.C. Sharma, for the Respondent

Final Decision : Dismissed

Judgement

S.P. Khare, J.

This is a petition under Article 226 of the Constitution of India for quashing the entire process of tender and for a direction for its reconsideration after receiving the tender of the petitioner.

The petitioner is a Public Limited Company having its head office at Nagpur. It was entrusted with "liasoning work" for movement of coal to Sarni Thermal Power Station of respondent No. 1 M.P. Electricity Board, Jabalpur, for a period of three years. That contract was about to expire in August, 1999 and therefore fresh tenders were floated well in time. The tender forms were supplied to the intending contractors. The tenders were to be submitted upto 3 P.M. on 8-7-1999 and these were to be opened on the same date at 3.30 P.M. The tenders were to be put in a box by the representatives of the tenderers. The respondents Nos. 3 to 5 placed their tenders in this box before 3 P.M. This box was sealed at 3 P.M. The petitioner claims that its representative reached the office of the respondent No. 1 at P.M. due to some problem in the vehicle. He submitted the letter dated 8-7-1999 (part of Annexure P-6) to the Executive Director of the respondent No.

1 requesting him to permit him for submitting the tender. The consideration of this letter by the Board took sometime and at about 7 P.M. the Board decided that the petitioner cannot be permitted to submit the tender after the time fixed for that purpose by the tender notice was over. The tenders of the respondents Nos. 3 to 5 were opened at 7.30 P.M. on the same date. The tender of respondent No. 5 B.S. N. Joshi and Sons Limited was found lowest and ultimately it has been accepted and he has been awarded the contract.

The petitioner's case is that the refusal of the respondent No. 1 to condone a little delay was arbitrary and unreasonable. It has deprived the petitioner of its valuable right. The tender of the petitioner was not considered. It is claimed that the rate quoted by the petitioner was lowest. The time of 3 P.M. fixed for submission of tender was not a "material term" of the tender and the time factor was not essence of submission of tender. It could be submitted upto 3.30 P.M., the time fixed for opening of the tender without contravening any term of the tender notice. It is also stated that the respondent No. 5 does not fulfil the criteria of having the requisite experience. It did not deposit the earnest money as per requirement of the tender notice as the F.D.R. submitted by it is in its own name and not in the name of the respondent No. 1. The petitioner wants that the contract awarded to the respondent No. 5 should be quashed and there should be a direction for re-tender.

The case of the respondents Nos. 1 and 2 is that the tender box was sealed at 3 P.M. as provided in the tender notice in the presence of the tenderers and therefore it was not possible for them to re-open that box after breaking its seal and allow the petitioner to put its tender therein. The respondents Nos. 1 and 2 have acted in terms of the tender notice and there was no arbitrariness in refusing to accept the tender of the petitioner after 3 P.M. There was breach of the material term by the petitioner and the time of the submission of the tender was the essence of the terms of the tender notice. The breaking of the seal of the tender box in order to allow the petitioner to place his tender therein would have given rise to a lot of speculation and the sanctity of the tender process would have been destroyed. The Board rightly refused to deviate from the specified tender condition. The respondent No. 5 has the requisite experience and the deposit of earnest money was also as per tender notice as the F.D.R. was pledged in favour of the respondent No. 1. The contract awarded to the respondent No. 5 is at a rate less than 20.43% at which the petitioner has been working for three years. The respondent No. 3 naturally has supported the action of the respondents Nos. 1 and 2.

The short point for determination is whether this Court in exercise of its power of judicial review should direct the respondents Nos. 1 and 2 to invite fresh tenders. The Learned Counsel for both the sides have been heard. It is argued on behalf of the petitioner that the time limit of 3 P.M. fixed by the tender notice was not like the limitation fixed by a statute such as the Limitation Act, which could not be extended. It was not a mandatory term. The tender could be accepted before

3.30 P.M., the time fixed for opening of the tender. Reliance is placed on M/s. Poddar Steel Corporation Vs. M/s. Ganesh Engineering Works and others, , Dr. N.G. Chatterji and Another Vs. Emperor, and B.D. Yadav and M.R. Meshram Engineers and Contractors Vs. Administrator of the City of Nagpur and Another, . On the other hand it is argued that the Board had no other option but to abide by and act in accordance with the terms of the tender notice and it would have been subjected to a lot of criticism if it had allowed the breaking open the seal of the tender box at the request of the petitioner. There was no arbitrariness or unreasonableness on its part. Now the rates of the tenderers are open and the contract has been awarded to the party whose rate was lowest and, therefore, at this stage there cannot be a judicial review of the administrative action.

It is necessary first of all to look at the three decisions cited by the Learned Counsel for the petitioner. In Dr. N.G. Chatterji and Another Vs. Emperor, , it has been observed that the period of time provided for submission of a tender is not a period such as is found in the Limitation Act, after which the rights of the parties are extinguished. It is only a measure of convenience and cannot be put at a higher level. These observations were made in a criminal case launched against a public servant, who failed to submit the tender upto the stipulated date but quoted the rates after a few days. It was held that there were no mala fides on his part in his omission to submit the tender before the date fixed for that purpose. The observations cannot be torn out of the context and fitted into a different situation to show that the time fixed for submission of the tender is not of much significance and the tender could be accepted even after the expiry of the time limit.

In B.D. Yadav and M.R. Meshram Engineers and Contractors Vs. Administrator of the City of Nagpur and Another, ; it has been observed that a distinction must be made where tenders are invited subject to certain conditions, between the conditions which are essential to the performance of the contract and the conditions which are ancillary or subsidiary to the main object of the contract.

In M/s. Poddar Steel Corporation Vs. M/s. Ganesh Engineering Works and others, , it has been held:

"The requirements in a tender notice can be classified into two categories -- those which lay down the essential conditions of eligibility and the others which are merely ancillary or subsidiary with the main object to be achieved by the conditions. In the first case the authority issuing the tender may be required to enforce them rigidly. In the other cases it must be open to the authority to deviate from and not to insist upon the strict literal compliance of the condition in appropriate cases."

On the other hand reference has been made to B. Rajkumar Patra Vs. Union of India (UOI) and Others, where it has been held that where the train by which the representative who came to submit the tender, ran unusually late on the day and the delay being beyond the control of the representative the tender was accepted

by the authority beyond the time fixed by the tender notice; the delayed arrival of the train could not constitute a justification to accept the tender furnished beyond time.

In the present case the Board was faced with the problem to decide whether the petitioner should be permitted to submit its tender beyond the time fixed for that purpose and the Board could take a decision either way in the exercise of its administrative discretion. It could condone the delay and accept the tender of the petitioner even if the box had been sealed or it could go by the terms of the tender notification and refuse to accept the tender after the time of its submission was over. Perhaps if it had adopted the liberal approach of the Courts in such matters it could have condoned the delay. But it adopted the other course of adhering to the tender conditions. That also cannot be termed to be arbitrary or unreasonable on the facts and in the circumstances of the case. The decision of the Board was not such which no reasonable person could take. There was no irrationality in its decision. It was not so outrageous in its defiance of logic that no sensible person could have arrived at. Therefore, it is not open to judicial review. The test is not the Court's own standard of reasonableness. The touchstone is the principle of "Wednesbury unreasonableness." The term relating to time-limit of the submission of tender was an essential condition of its eligibility and it was not an ancillary condition.

The discretion is never unfettered. It has to be exercised reasonably. The test or standard of reasonableness varies with the situation. There should not be an unreasonable exercise of discretion. The decision in such a case is unlawful if it is one "to which no reasonable authority could have come". This is now what is called "Wednesbury unreasonableness". It has acquired a nickname in administrative law after it was laid down by Lord Greene MR in *Associated Provincial Picture Houses Ltd. vs. Wednesbury Corporation*, (1947) 2 All.ER 680. It means that the decision is so wrong that no reasonable person could sensibly take that view. "Wednesbury" is now a common and convenient label indicating the special standard of unreasonableness which has become the criterion for judicial review of administrative discretion.

Lord Scarman has explained in *R. vs. Secretary of State* (1986) A.C. 240 that "Wednesbury principle" is a convenient legal "shorthand" used by lawyers to refer to the classical review by Lord Greene MR in the *Wednesbury* case of circumstances in which the Courts will intervene to quash as being illegal the exercise of administrative discretion.

H.W. R. Wade in his book on Administrative Law, 7th Edition page 399 says: "The doctrine that powers must be exercised reasonably has to be reconciled with no less important doctrine that the Court must not usurp the discretion of the public authority". Within the bounds of legal reasonableness is the area in which the deciding authority has genuinely free discretion. If it passes the bounds, it acts ultra vires But if the decision is within the confines of reasonableness, it is no part of the Court function to look further into merits. As Lord Hailsham L C has

said in *Re W (An Infant)* 1971 AC 682; two reasonable persons can perfectly reasonably come to opposite conclusions on the same set of facts without forfeiting their title to be regarded as reasonable. Not every reasonable exercise of judgment is right, and not every mistaken exercise of judgment is unreasonable. There is ample room, within the legal boundaries, for radical differences of opinion in which neither side is unreasonable. One party may call the other "quite unreasonable" when he is well within the legal limits of reasonableness. Lord Diplock said in "*Tameside*" case (1977) AC 1014; the very concept of administrative discretion involves a right to choose between more than one possible course of action upon which there is room for reasonable people to hold differing opinions as to which is to be preferred.

The Law laid down by the Supreme Court in *Tata Cellular Vs. Union of India*, has also become of classic significance. It has been held that the modern trend points to judicial restraint in administrative action. The Court does not sit as Court of appeal but merely reviews the manner in which the decision was made. Thus the Indian Law is also in tune with the mood in England. It is emphasised that there should be a right balance between the administrative discretion and its judicial review. Judicial review is concerned with the reviewing not the merit of the decision but the decision making process itself. It is different from an appeal. It is not the function of the Court to act as a superboard, or with the zeal of a pedantic school master substituting its judgment for that of the administrative authority. The "*Wednesbury Principle of reasonableness*" has been fully approved in this case by the Supreme Court. While exercising the power of judicial review in keeping the administrative authorities within the limits of their power the Court cannot overstep the limits of its own jurisdiction. The power of judicial review is supervisory in order to see that the decision making authority acts fairly. There should be fair play in action but to some extent "free play in the joints" is permissible. A thing is not unreasonable in the legal sense merely because the Court thinks it unwise.

In *New Horizons Limited and Another Vs. Union of India (UOI) and Others*, and recently in *Raunaq International Limited Vs. I.V.R. Construction Ltd. and Others*, the same principles have been reiterated. Again it has been observed that the judicial review is permissible only on the established grounds for such review including mala fides, arbitrariness or unreasonableness of the *Wednesbury* variety. It is held that if the administrator acts fairly though falters in wisdom, the Court should not interfere by acting as a superauditor. The *Wednesbury Principle* is now not confined to the English decisions but is now found sprinkled in Indian decisions also.

In view of the above legal position the action of the respondent No. 1 in refusing to accept the tender of the petitioner after the expiry of the period of the time limit is not so unreasonable that this Court should interfere with it in the exercise of its power of judicial review especially when the tenders have already been opened the rates quoted by the tenderers are known to everyone.

The petition is dismissed.